A

POSITIVE VISION LABUAN LIMITED v. KETUA PENGARAH HASIL DALAM NEGERI & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
SURIYADI HALIM OMAR FCJ
B AHMAD MAAROP FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEALS NO: 01(f)-11-03-2015(W),
01(f)-12-03-2015(W) & 01(f)-13-03-2015(W)]
C 20 FEBRUARY 2017

REVENUE LAW: *Income tax – Exempt income – Exemption order exempting from income tax various types of income – Income tax dividends received by offshore company – Whether offshore company qualified for exemption from income tax –*
D *Whether Director of Inland Revenue correct in law to disallow tax exemption available under Income Tax (Exemption) (No 22) Order 2007 – Whether Ministry of Finance could by policy or administrative decision declare Exemption Order ceased to apply – Whether s. 3A of Labuan Business Activity Tax Act 1990 expressly states offshore companies are eligible or denied exemption – Whether Exemption*
E *Order has legal status of subsidiary legislation – Whether s. 127(5) of Income Tax Act 1967 gives offshore company vested rights – Whether Ministry of Finance or Director of Inland Revenue has jurisdiction to rely arbitrarily on policy to deny offshore company's entitlement to tax exemption – Whether time frame prescribed on exemption order – Whether denial of right to exemption ultra vires, illegal or void*

F ***CIVIL PROCEDURE:*** *Judicial review – Income tax – Exemption order exempting from income tax various types of income – Income tax dividends received by offshore company – Whether offshore company qualified for exemption from income tax – Whether Director of Inland Revenue correct in law to disallow tax exemption available under Income Tax (Exemption) (No 22) Order 2007 – Whether Ministry*
G *of Finance could by policy or administrative decision declare Exemption Order ceased to apply – Whether s. 3A of Labuan Business Activity Tax Act 1990 expressly states offshore companies are eligible or denied exemption – Whether Exemption Order has legal status of subsidiary legislation – Whether s. 127(5) of Income Tax Act 1967 gives offshore company vested rights – Whether Ministry of Finance or*
H *Director of Inland Revenue has jurisdiction to rely arbitrarily on policy to deny offshore company's entitlement to tax exemption – Whether time frame prescribed on exemption order – Whether denial of right to exemption ultra vires, illegal or void*

I

STATUTORY INTERPRETATION: *Subsidiary legislation – Validity – Exemption order – Whether made by statutory order – Whether an order having legislative effect – Whether to be read subject to and consistent with provisions of substantive or parent Act – Whether exemption order has legal status of subsidiary legislation – Interpretation Acts 1948 and 1967, ss. 3 & 24*

WORDS & PHRASES: *'Chargeable offshore company' – Whether referred to offshore companies which had made election to be subject to tax – Whether companies fell under s. 3A of Labuan Business Activity Tax Act 1990 and s. 3B of Income Tax Act 1967 – Whether companies proved that exemption order applied to them*

The appellants, being companies incorporated under the Labuan Companies Act 1990, as a general rule, would be subject to tax under the Labuan Business Activity Tax Act 1990 ('LBATA'). About three months after their incorporation, the appellants made statutorily permissible irrevocable election to be subject to tax under the Income Tax Act 1967 ('ITA'). The appellants had received dividends in the year of assessment 2011, income which they believed was exempted from income tax, on account of the exemption provided for under the Income Tax (Exemption) (No 22) Order 2007 ('Exemption Order'). After some correspondences were exchanged between the appellants and the respondent, the respondent informed the appellants that no Labuan company would be qualified for exemption from income tax under the Exemption Order effective 12 February 2010, once an election was made. The appellants therefore did not qualify. The appellants filed an application for leave to commence judicial review, *inter alia*, for an order of *certiorari* to quash the respondent's decision. The High Court dismissed the appellants' application for judicial review with costs though conceded that the appellants were entitled to exemption up to the date of election. The Court of Appeal, in affirming the decision of the High Court, opined that as the appellants were now 'chargeable offshore company' the moment the elections were made, they therefore were no longer within the terms of the Exemption Order. The appellants obtained leave from this court on the following questions of law (a) whether the Ministry of Finance could by a policy or administrative decision declare that an Exemption Order, which was a subsidiary legislation under the Interpretation Acts 1948 and 1967, cease to apply from a stipulated date without revoking the same; (b) whether a Labuan offshore company which elects under s. 3A of the LBATA to be taxed under the ITA and Exemption Order acquires a vested right that remained so long as the Exemption Order remained in force; (c) whether an offshore company which has elected to be taxed under s. 3B of the ITA which is now known as a Labuan company for the purposes of the LBATA was entitled to the tax exemption granted under the Exemption Order.

Held (allowing appeal)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Under the new s. 3A inserted into the LBATA by s. 72 of the Finance Act 2007, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form to be charged to tax under the ITA. Section 3B of ITA imported a new terminology; it now made reference to an offshore company that has made an election under the new s. 3A of the LBATA, as 'chargeable offshore company' for purposes of the ITA scheme. This new amended provision of s. 3B of the ITA makes no reference to the Exemption Order, and does not expressly state that offshore companies, which had elected to be taxed under the ITA, to be eligible or denied the exemption. (paras 27-29)

(2) The insertion of s. 3B was to be effective from the year of assessment 2008 and subsequent years of assessment. The Exemption Order was to have effect for the year of assessment 2007 and subsequent years of assessment. There would have been no necessity to make the Exemption Order in relation to years of assessment subsequent to 2007 if it was not intended to apply to chargeable offshore companies after the year of assessment 2007. The extension of the Exemption Order to years of assessment beyond 2007 was clearly a transitional measure to enable an offshore company which had made an election to still gain the benefit under s. 3B accorded to offshore companies which did not make such election, until such time as the Minister deemed it expedient to remove the benefit. When that happens, the cessation of that benefit can only be by way of revocation of the Exemption Order by another order, not a policy decision expressed administratively. (paras 31-33)

(3) Section 127(3) of the ITA provides that the Exemption Order is made by a statutory order, defined under s. 2 to mean an order having legislative effect. Clothed with legislative effect, this statutory order fits in squarely within the words 'subsidiary legislation' which is defined as 'any … order … or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967'. The Exemption Order which comes as a statutory order thus has the legal status of a subsidiary legislation, and anything done under any subsidiary legislation shall be deemed to be done under the Act or other written law under which the subsidiary legislation was made (s. 24 of the Interpretation Acts 1948 and 1967). In succinct terms, the Minister by statutory order, as empowered by s. 127(3) of the ITA, had granted an exemption to any offshore company in respect of its dividends income. As the appellants were offshore companies, the Exemption Order applied to them. (paras 51-54)

(4) Section 127(5) of the ITA gives the appellants vested rights that cannot be taken away unless there exists clear terms that state otherwise. If the words of the Exemption Order are clear, then obey it. By virtue of the ordinary and natural meaning of the Exemption Order, and reading s. 3B of the ITA together with it, there could only be one interpretation *ie* dividends are exempted from tax under the ITA. As giving any other interpretation would lead to a departure of what was intended by the Legislature inscribed by the words of the statutory order, it was therefore incumbent upon the respondent to put into effect the appellants' statutory right *ie* to exempt dividends from income tax. (paras 61 & 62)

(5) It was the duty of the court to carefully scrutinise the extent of the delegation, particularly in cases which involved a right to impose any financial burden on a person or class of persons. Even though the appellants had not been burdened by additional taxes, by depriving them of the exemption the appellants had been financially burdened in another way. With the impugned policy never having been issued pursuant to any power authorised by Parliament, unlike an Exemption Order, which was a subsidiary legislation, the policy adverted to by the respondent therefore did not have any force of law. In accordance with the settled rules of construction, the respondent or the Ministry of Finance thus had no jurisdiction to unilaterally and arbitrarily rely on policy to deny the appellants' entitlement to the tax exemption. As the words in the Exemption Order were clear, and the appellants evidentially fell within the terms of the order, they therefore could not be denied of the benefits legislated. (paras 65-67)

(6) The respondent, or the Ministry of Finance, had no jurisdiction to unilaterally and arbitrarily declare 12 February 2010 as the cut-off date for the appellants to claim tax exemption for its dividend income by way of policy. With the Exemption Order yet to be revoked, apart from not prescribing a time frame for its duration, the respondent or the Ministry of Finance could not by policy or administrative decision declare that the Exemption Order ceased to apply as against the appellants. That denial of right to the exemption was therefore *ultra vire*s, illegal, void, unlawful and/or in excess of any authority given. Therefore, question (a) was to be answered in the negative whilst questions (b) and (c) were to be answered in the positive. (paras 71-76)

Bahasa Malaysia *Headnotes*

Perayu-perayu, syarikat-syarikat yang ditubuhkan di bawah Akta Syarikat Labuan 1990, secara amnya, tertakluk kepada cukai di bawah Akta Cukai Aktiviti Perniagaan Labuan 1990 ('LBATA'). Tiga bulan selepas penubuhannya, perayu-perayu membuat pemilihan tidak boleh ditarik balik

secara statutori yang dibenarkan untuk tertakluk kepada cukai di bawah Akta Cukai Pendapatan 1967 ('ITA'). Perayu-perayu menerima dividen dalam tahun taksiran 2011, pendapatan yang mereka percaya dikecualikan daripada cukai pendapatan, atas dasar pengecualian yang disediakan di bawah Perintah Cukai Pendapatan (Pengecualian) (No 22) 2007 ('Perintah Pengecualian'). Selepas beberapa surat-menyurat di antara perayu-perayu dan responden, responden memaklumkan kepada perayu-perayu bahawa tiada syarikat Labuan layak untuk pengecualian daripada cukai pendapatan di bawah Perintah Pengecualian berkuat kuasa 12 Februari 2010, setelah pemilihan dibuat. Oleh itu, perayu-perayu tidak layak. Perayu-perayu memfailkan permohonan kebenaran semakan kehakiman, antara lain, untuk perintah *certiorari* membatalkan keputusan responden. Mahkamah Tinggi menolak permohonan perayu-perayu untuk semakan kehakiman dengan kos tetapi mengakui bahawa perayu-perayu berhak mendapat pengecualian sehingga tarikh pemilihan. Mahkamah Rayuan, dalam mengesahkan keputusan Mahkamah Tinggi, berpendapat bahawa perayu-perayu adalah 'chargeable offshore company' apabila pemilihan dibuat, dengan itu mereka tidak lagi terangkum dalam syarat-syarat Perintah Pengecualian. Perayu-perayu memperolehi kebenaran daripada mahkamah ini atas soalan-soalan undang-undang berikut (a) sama ada Kementerian Kewangan melalui polisi atau keputusan pentadbiran boleh mengisytiharkan bahawa Perintah Pengecualian, satu peruntukan subsidiari di bawah Akta Tafsiran 1948 dan 1967, terhenti terpakai dari satu tarikh ditetapkan tanpa membatalkan yang sama; (b) sama ada syarikat luar pesisir Labuan yang memilih di bawah s. 3A LBATA untuk dicukaikan di bawah ITA dan Perintah Pengecualian memperoleh satu hak kukuh yang tetap selagi Perintah Pengecualian kekal berkuat kuasa; (c) sama ada syarikat luar pesisir yang memilih untuk dicukaikan di bawah s. 3B ITA yang sekarang dikenali sebagai sebuah syarikat Labuan untuk tujuan LBATA berhak untuk mendapat pengecualian cukai di bawah Perintah Pengecualian.

Diputuskan (membenarkan rayuan)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Di bawah s. 3A baru yang telah dimasukkan ke dalam LBATA oleh s. 72 Akta Kewangan 2007, sebuah entiti Labuan yang menjalankan aktiviti perniagaan di Labuan boleh membuat pemilihan tidak boleh ditarik balik dalam bentuk yang ditetapkan untuk dikenakan cukai di bawah ITA. Seksyen 3B ITA memberikan istilah baru; ia sekarang membuat rujukan kepada satu syarikat luar pesisir yang telah membuat pemilihan di bawah s. 3A LBATA, sebagai 'chargeable offshore company' bagi tujuan skim ITA. Peruntukan yang baru dipinda ini iaitu s. 3B ITA tidak membuat rujukan kepada Perintah Pengecualian, dan

tidak secara jelas menyatakan bahawa syarikat luar pesisir, yang memilih untuk dicukaikan di bawah ITA, layak atau dinafikan pengecualian.

(2) Kemasukan s. 3B adalah berkuat kuasa dari tahun taksiran 2008 dan tahun-tahun taksiran berikutnya. Perintah Pengecualian adalah berkuat kuasa bagi tahun 2007 dan tahun-tahun taksiran berikutnya. Tiada keperluan untuk membuat Perintah Pengecualian berhubungan tahun-tahun taksiran selepas 2007 jika ia tidak bertujuan untuk diguna pakai kepada syarikat luar pesisir selepas tahun taksiran 2007. Perlanjutan Perintah Pengecualian kepada tahun taksiran selepas 2007 adalah jelasnya satu langkah tradisional untuk membolehkan sebuah syarikat luar pesisir yang telah membuat pemilihan mendapatkan faedah di bawah s. 3B diberikan kepada syarikat-syarikat luar pesisir yang tidak membuat pemilihan itu, sehingga suatu masa Menteri mendapati adalah sesuai untuk membuang manfaat itu. Apabila perkara itu berlaku, pemberhentian manfaat itu hanya boleh dibuat melalui pembatalan pengarahan pengecualian melalui satu lagi perintah, dan bukan keputusan polisi yang dinyatakan secara pentadbiran.

(3) Seksyen 127(3) ITA memperuntukkan bahawa Perintah Pengecualian dibuat oleh perintah statutori, ditakrifkan di bawah s. 2 untuk bermaksud bahawa perintah yang mempunyai kesan perundangan. Dipakaikan dengan kesan perundangan, perintah statutori ini terangkum dalam perkataan 'subsidiary legislation' yang ditafsirkan sebagai 'any … order … or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967'. Perintah Pengecualian yang muncul sebagai perintah statutori mempunyai status undang-undang daripada perundangan statutori, dan apa-apa yang dilakukan di bawah perundangan subsidiari hendaklah disifatkan sebagai dilakukan di bawah Akta atau undang-undang bertulis di mana perundangan subsidiari dibuat (s. 24 Akta Tafsiran 1948 dan 1967). Secara ringkas, Menteri melalui perintah statutori, yang diberikan kuasa oleh s. 127(3) ITA, telah membenarkan pengecualian kepada mana-mana syarikat luar pesisir behubungan pendapatan dividen. Oleh kerana perayu-perayu adalah syarikat luar pesisir, Perintah Pengecualian diguna pakai ke atas mereka.

(4) Seksyen 127(5) ITA memberikan perayu-perayu hak kukuh yang tidak boleh dinafikan kecuali wujudnya syarat-syarat jelas yang menyatakan sebaliknya. Jika perkataan-perkataan Perintah Pengecualian adalah jelas, maka ia seharusnya dipatuhi. Memandangkan maksud semulajadi dan biasa Perintah Pengecualian, dan bacaan s. 3B ITA bersama-samanya, hanya satu tafsiran yang boleh dibuat iaitu dividen

dikecualikan daripada cukai di bawah ITA. Oleh kerana tafsiran lain akan membawa kepada penyimpangan daripada apa yang diniatkan oleh Badan Perundangan yang tertulis oleh kata-kata perintah statutori, adalah tanggungjawab responden untuk melaksanakan hak statutori perayu-perayu iaitu untuk dividen-dividen dikecualikan daripada cukai pendapatan.

(5) Adalah tanggungjawab mahkamah untuk meneliti dengan berhati-hati keluasan delegasi, terutamanya dalam kes yang melibatkan hak untuk mengenakan bebanan kewangan ke atas seseorang atau segolongan orang. Walaupun perayu-perayu tidak dibebankan oleh cukai tambahan, perayu-perayu telah dibebankan dari segi kewangan dengan cara lain apabila hak mereka ke atas pengecualian dinafikan. Dengan polisi yang dipersoalkan tidak pernah dikeluarkan menurut mana-mana kuasa yang diberikan oleh Parlimen, tidak seperti satu Perintah Pengecualian, yang merupakan perundangan subsidiari, polisi yang dirujuk oleh responden tidak mempunyai apa-apa kuat kuasa undang-undang. Sejajar dengan peraturan-peraturan pentafsiran yang ditetapkan, responden atau Menteri Kewangan tidak mempunyai bidang kuasa untuk secara unilateral atau secara arbitrari merujuk kepada polisi bagi menafikan hak perayu-perayu kepada pengecualian cukai. Oleh sebab perkataan-perkataan dalam Perintah Pengecualian adalah jelas, dan perayu-perayu terangkum dalam syarat-syarat perintah, mereka dengan itu tidak boleh dinafikan manfaat-manfaat seperti yang digubal.

(6) Responden, atau Menteri Kewangan, tidak mempunyai bidang kuasa untuk secara unilateral atau secara arbitrari mengisytiharkan 12 Februari 2010 sebagai tarikh penggalan untuk perayu-perayu menuntut pengecualian cukai untuk pendapatan dividen melalui polisi. Dengan Perintah Pengecualian belum lagi dibatalkan, selain daripada kegagalan menetapkan satu kerangka masa untuk tempohnya, responden atau Menteri Kewangan tidak boleh, melalui polisi atau keputusan pentadbiran, mengisytiharkan Perintah Pengecualian tidak boleh diguna pakai terhadap perayu-perayu. Penafian hak kepada pengecualian adalah dengan itu *ultra vires*, tidak sah, menyalahi undang-undang dan/atau melebihi apa-apa kuasa yang diberikan. Oleh itu, soalan (a) dijawab secara negatif dan soalan-soalan (b) dan (c) dijawab secara positif.

Case(s) referred to:

Bulova Watch Co v. Attoerney General of Canada [1951] OR 360 ***(refd)***

Edward Maughan (Surveyor of Taxes) v. The General Trustees of the Free Church of Scotland (1893) 20R 759 ***(refd)***

Hansraj v. HH Dave Asst. Collector of Excise AIR 1970 SC 755 ***(refd)***

Kamla Devi v. Takhatmal AIR 1964 SC 859 ***(refd)***

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Co-operative Insurance Society Ltd [2000] 2 CLJ 149 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***
Mangin v. Inland Revenue Commissioners [1971] AC 739 ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] 4 CLJ 576 HC ***(refd)***
Vacher & Sons v. London Society of Compositors [1913] AC 107 ***(refd)***
WT Ramsay Ltd and Ors v. Inland Revenue Commissioners and Ors [1982] AC 300 ***(refd)***

Legislation referred to:
Federal Constitution, art. 96
Finance Act 2007, ss. 4, 72
Income Tax Act 1967, ss. 2(1), (10)(e), 3B, 127(3)(b), (4), (5)
Interpretation Acts 1948 and 1967, ss. 3, 22, 24, 35(2)
Labuan Business Activity Tax Act 1990, ss. 2(3), 3, 3A, 4, 26

Other source(s) referred to:
Aiyars Major Law Lexicon, 4th edn. 2010, vol 2, p 2075

(Civil Appeal No: 01(f)-11-03-2015(W) & 01(f)-13-03-2015(W))
For the appellants - Cyrus Das & T Sudhar; M/s Shook Lin & Bok
For the respondent - Hazlina Hussain, Muhammad Farid Jaafar & Norsalwani Muhd Nor FCs, Inland Revenue Board

(Civil Appeal No: 01(f)-12-03-2015(W))
For the appellant - DP Naban & Ashley Lee Si Han; M/s Shook Lin & Bok
For the respondent - Hazlina Hussain, Abu Tariq Jamaluddin, Muhammad Farid Jaafar & Norsalwani Muhd Nor; FCs, Inland Revenue Board

[Editor's note: For the Court of Appeal judgment, please see Positive Vision Labuan Limited Avenues Zone Inc v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals [2014] 8 CLJ 285 (overruled);
For the High Court judgment, please see Positive Vision Labuan Limited v. Ketua Pengarah Hasil Dalam Negeri [2013] 1 LNS 459 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The appellants, being companies incorporated in 2011 under the Labuan Companies Act 1990, as a general rule would be subject to tax under the Labuan Business Activity Tax Act 1990 (the LBATA), an Act to provide

for the imposition, assessment and collection of tax on a Labuan business activity carried on by a Labuan entity in or from Labuan and for matters connected therewith.

[2] Section 72 of the Finance Act 2007 (Act 683) inserted s. 3A into the LBATA. Under s. 3A (which has effect for the year of assessment 2009 and subsequent years of assessment a Labuan entity carrying on a Labuan business activity may make an irrevocable election that any profit of the Labuan entity for any basis period for a year of assessment and subsequent basis period, be charged to tax under the ITA.

[3] Under s. 2(3) of the LBATA, it is legislated that for the avoidance of doubt, the provisions of the ITA shall apply in respect of an activity other than a Labuan business activity carried on by a Labuan entity and a Labuan business activity carried on by a Labuan entity which makes an election under s. 3A of the LBATA.

[4] The appellants, about three months after their incorporation, made that statutorily permissible irrevocable election to be subject to tax under the ITA.

[5] The appellants had received dividends in the year of assessment 2011, income which they believed was exempted from income tax, on account of the exemption provided for under the Income Tax (Exemption) (No. 22) Order 2007 PU(A) 437/2007 (Exemption Order). The appellants on 16 January 2012, through their tax consultants, applied for a decision from the respondent in respect of the exemption of those dividends under the Exemption Order.

[6] After some correspondences were exchanged between the appellants and the respondent, the respondent informed the appellants that no Labuan company would be qualified for exemption from income tax under the Exemption Order effective 12 February 2010, once an election was made. The appellants therefore did not qualify.

[7] On 27 July 2012, the appellants filed an application for leave to commence judicial review, *inter alia*, for an order of *certiorari* to quash the respondent's decision.

[8] Leave was granted on 14 August 2012 by the High Court.

[9] On 6 February 2013, the High Court dismissed the appellants' application for judicial review with costs though conceded that the appellants were entitled to exemption up to the date of election. In short, the High Court held that the respondent was wrong when deciding that, effective 12 February 2010, any Labuan company that made the election to be taxed under the ITA was ineligible to any exemption under the Exemption Order.

[10] Being dissatisfied, the appellants appealed to the Court of Appeal. On 27 June 2014 the Court of Appeal dismissed the appellants, appeal with costs of RM30,000 and affirmed the decision of the High Court. The Court of Appeal opined that, as the appellants were now "chargeable offshore company" the moment the elections were made, they therefore were no longer within the terms of the Exemption Order.

[11] On 16 March 2015 the appellants successfully obtained leave from us on the following questions of law:

(a) Whether the Ministry of Finance could by a policy or administrative decision declare that an Exemption Order, *to wit*, Income Tax (Exemption) (No. 22) Order 2007 PU(A) 437/2007, which is a subsidiary legislation under the Interpretation Acts 1948 and 1967, cease to apply from a stipulated date without revoking the same?

(b) Whether a Labuan offshore company which elects under s. 3A of the Labuan Business Activity Tax Act 1990 to be taxed under the Income Tax Act 1967 and Exemption Order acquires a vested right that remains so long as the Exemption Order remains in force?

(c) Whether an offshore company which has elected to be taxed under s. 3B of the Income Tax Act 1967 which is now known as a Labuan company for the purposes of the Labuan Business Activity Tax Act 1990, is entitled to the tax exemption granted under the Income Tax (Exemption) (No. 22) Order 2007?

The Appellants' Submission

[12] Learned counsel for the appellants submitted that the Exemption Order applies to an offshore company that falls within the meaning assigned under s. 2 of the LBATA. Section 3(a) of the Exemption Order also states that the Minister exempts from tax dividends received by an offshore company. The appellants submitted that it was beyond dispute that the appellants are offshore companies.

[13] It was submitted that the Exemption Order does not state that the exemption excludes offshore companies that have elected to be taxed under the ITA. Having elected to be taxed under the ITA, there was thus compelling reason for the Exemption Order, which was also made under the ITA, to still apply to them. As it is still subsisting, it continues to exempt dividends received by the appellants. That acquired right remained as long as the Exemption Order remains in force, and thus it was incumbent on the respondent to give effect to the will of the Legislature.

[14] Expanding on this argument, the appellants submitted that s. 3B of the ITA and s. 3A of the LBATA did not affect the application of the Exemption Order. Section 3B of the ITA did not make any reference to the Exemption Order, and did not restrict offshore companies, which have elected to be taxed under the ITA to be eligible for the exemption.

[15] It was further submitted by the appellants that the term "chargeable offshore company" as contained in s. 3B of the ITA, was irrelevant for purposes of determining "offshore company" under the Exemption Order. In fact, s. 3B of the ITA merely describes an offshore company that has elected to be taxed under the ITA, as a "chargeable offshore company".

[16] According to the appellants, it was therefore puzzling as to how the learned judge could arrive at the conclusion that s. 3B of the ITA made it clear that companies that have elected to be taxed under the ITA were not covered by the Exemption Order. They contended that the respondent has no legal basis for denying the tax exemption. By denying the exemption the learned judge had effectively rewritten the effect of the Exemption Order permitted by s. 3B of the ITA.

[17] Learned counsel for the appellants further submitted that the respondent's decision not to accord the benefits of the Exemption Order based on the policy of the Ministry of Finance, and without revoking it, contravened the Exemption Order. It amounted to an error of law. The said decision was thus *ultra vires*, illegal, void, unlawful and/or in excess of authority.

[18] The appellants ventilated the argument that the Court of Appeal seemed to have proceeded on an implicit revocation of the Exemption Order by relying on the amendments made to the ITA and the LBATA, brought about by the Finance Act 2007 (Act 683) and the Labuan Offshore Business Activity Tax (Amendment) Act 2010 (Act A1366).

[19] The appellants submitted that tax law does not recognise any doctrine of implied revocation.

The Respondent's Submission

[20] The respondent submitted that s. 3B of the ITA makes it clear that companies which have elected to be taxed under the ITA are not covered by the Exemption Order. Section 3B of the ITA establishes an offshore company into a chargeable offshore company in reference to an offshore company that has made an election under s. 3A of the LBATA to be taxed under the ITA.

[21] It was submitted that having made the election under s. 3A of the LBATA, the appellants no longer were "offshore companies" and therefore excluded from the Exemption Order. It was submitted that these provisions of the law are clear and unambiguous and must be strictly interpreted.

[22] Learned counsel for the respondent further submitted that there was no necessity to repeal or revoke the existing Exemption Order as it was still available to an offshore company taxed under the LBATA or offshore companies that have yet to make elections under the ITA.

[23] The respondent submitted that s. 3B of the ITA expressly excluded an offshore company which elects to be subject to the ITA from being an offshore company for the purpose of tax exemption. The company could not now avail itself of the benefit of the exemption, which is applicable only for an offshore company under the LBATA. In short, as the appellants are no longer "offshore companies" they are therefore no longer entitled to the exemption from income tax under the Exemption Order.

Our Analysis

[24] The appellants are offshore companies having been incorporated on the following dates under the Labuan Companies Act 1990:

(i) Positive Vision Labuan Ltd. – 22 March 2011;

(ii) GA Investment Ltd. – 22 March 2011; and

(iii) Avenue Zone Inc. – 16 March 2011.

[25] The appellants are known as 'Labuan companies' and 'Labuan entities' under s. 3 of the LBATA pursuant to changes brought about by the amending s. 3(2) of the Labuan Offshore Business Activity (Amendment) Act 2010 (Act A1366), and are in the business of investment holding, with their registered offices being in Labuan. There are no disagreements as to the character of the appellants by both parties (except once the appellants elected to be taxed under the ITA).

[26] The profit of a Labuan company is subject to a preferential tax and shall be charged at the rate of 3% for a year of assessment upon the chargeable profits under s. 4 of the LBATA. It may even elect to be charged for a year of assessment to a fixed tax of RM20,000 under the LBATA.

[27] As abovementioned at para. 2, under the new s. 3A inserted into the LBATA by s. 72 of Act 683, a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form to be charged to tax under the ITA. To elucidate further, Act 683 brought about amendments of the ITA, the LBATA and two other unconnected Acts (the Stamp Duty Act 1949 and the Petroleum (Income Tax) Act 1967).

[28] Under s. 4 of Act 683, s. 3B of the ITA was amended, and thereafter reads as follows:

> Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company ***other than an offshore company (in this Act referred to as "chargeable offshore company"), which has made an election under section 3A of the Labuan Offshore Business Activity Tax Act 1990*** (amendments emphasised).

[29] The above amendment to s. 3B of ITA imported a new terminology. It now made reference to an offshore company that has made an election under the new s. 3A of the LBATA, as 'chargeable offshore company' for purposes of the ITA scheme.

[30] It is noteworthy that the new term 'chargeable offshore company' is peculiar only to ITA and absent in the LBATA and the Exemption Order. This new amended provision of s. 3B of the ITA makes no reference to the Exemption Order and does not expressly state that offshore companies, which have elected to be taxed under the ITA, to be eligible or denied the exemption. The relevancy or want of the introduction of the term 'chargeable', leading to the phrase "chargeable offshore company", becomes clearer at the end of these grounds of judgment.

[31] Act 683 which inserted s. 3B into the ITA was published in the *gazette* on 28 December 2007. The Exemption Order was also published in the *gazette* on 28 December 2007.

The insertion of s. 3B was to be effective from the year of assessment 2008 and subsequent years of assessment. The Exemption Order was to have effect for the year of assessment 2007 and subsequent years of assessment.

[32] There would have been no necessity to make the Exemption Order in relation to years of assessment subsequent to 2007 if it was not intended to apply to chargeable offshore companies after the year of assessment 2007 (as, by virtue of s. 3B, by the year of assessment 2008 tax would no longer be charged on income in respect of an offshore company except an offshore company which had made an election).

[33] In our view, the extension of the Exemption Order to years of assessment beyond 2007 was clearly a transitional measure to enable an offshore company which had made an election to still gain the benefit under s. 3B accorded to offshore companies which did not make such election, until such time as the Minister deems it expedient to remove the benefit. When that happens, the cessation of that benefit can only by way of revocation of the Exemption Order by another order, not by a policy decision expressed administratively.

[34] Section 2(10)(e) of the ITA, in tandem with changes brought about by the Labuan Offshore Business Activity (Amendment) Act 2010 (Act A1366), also legislated that the term "offshore company, would thenceforth be referred to as 'Labuan company' which under s. 2(1) ITA simply means 'a Labuan company incorporated under the Labuan Companies Act 1990'.

[35] For further clarification of the effect of the amendments to the LBATA and ITA, it is of relevance to refer to s. 35(2) of the Interpretation Acts 1948 and 1967 for guidance. Its reads as follows:

Section 35(2)

> Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law or provision so repealed shall be construed as references to the re-enacted law or provision.

[36] Pursuant to the above s. 35(2) of the Interpretation Acts 1948 and 1967, the term "offshore company" in the Exemption Order thus must be construed as to eventually mean "Labuan company", after taking into account the amendments in the LBATA. Under s. 2(10)(e) of the ITA, the term "offshore company" is referred to as "Labuan company".

[37] It is inevitable that preferential tax treatment be given to an offshore company (alternatively Labuan company) in order to maintain the competitiveness of Labuan as a business hub. A Labuan company may opt for a tax of 3% for a year of assessment upon the chargeable profits or elect to be charged for that year of assessment to tax of RM20,000 under the LBATA. The icing is s. 26 of the LBATA which empowers the Minister to exempt any Labuan entity in respect of any chargeable profits of that company.

[38] It does not take an accountant to reason out why the appellants opted for the ITA and abandoned the fantastic terms of the LBATA. Statutorily under the LBATA the appellants cannot avoid paying some tax to the respondent, bearing in mind that there is no evidence of any exemption given to them under s. 26 of the LBATA, as opposed to the Exemption Order being dangled to any offshore company under the ITA. With the availability of the Exemption Order either very little or no tax will be paid by the appellants under the ITA. Obviously, any Labuan company that makes an irrevocable election to tax under the ITA must have benefits in its mind, ie, the exemption from the Exemption Order. There is nothing wrong in the appellants arranging their affairs in order to reduce his tax. Lord Wilberforce in *W.T Ramsay Ltd and Ors v. Inland Revenue Commissioners and Ors* [1982] AC 300 said:

> A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides.

[39] The appellants respectively made the fateful irrevocable election, three months after their incorporation (see para. 24 for their dates), as per the following dates:

15 June 2011: Positive Vision Labuan Ltd

30 May 2011: GA Investment Ltd

13 June 2011: Avenues Zone Inc.

[40] Thenceforth dissatisfaction arose hence this appeal.

[41] The chronology of events shows that on 16 January 2012 the appellants through their tax consultant, Messrs PricewaterhouseCoopers Taxation Services Sdn Bhd, applied for a decision from the respondent in respect of the exemption of their dividends received for the year of assessment of 2011 (dividends amounting to RM49,300,000) from income tax under the Exemption Order.

[42] In response, on 21 February 2012 the respondent informed the appellants' tax consultant that the appellants may submit the tax returns for the year of assessment 2011 based on their interpretation of the Exemption Order, as the Ministry of Finance had yet to state its policy in respect of the decision requested by the appellants. We could safely conclude that 'policy' in the context of this appeal, must mean a set of ideas, approach or plan of what to do in a particular situation agreed upon by the Minister of Finance.

[43] On 27 February 2012 the appellants submitted their tax returns for the year of assessment 2011 after having been granted an extension of time until 29 February 2012.

[44] On 20 June 2012, the respondent informed the appellants that even though the exemption prescribed under the Exemption Order was available to them, however, as a matter of policy, the said exemption was no longer available to them from 12 February 2010. Paragraph 3 of the said decision of the respondent, found in exh. SYC1, signed by the Pengarah Jabatan Dasar Percukaian of LHDN, reads as follows:

> Merujuk kepada Perintah Cukai Pendapatan (Pengecualian) (No. 22) 2007[Exemption Order] PU(A) 327/2007, entity Labuan layak menikmati pengecualian ke atas pendapatan dividen … jika membuat pilihan dicukai di bawah [ITA]. Bagaimanapun berkuat kuasa 12.2.2010, pihak Kementerian Kewangan telah memutuskan bahawa entity Labuan yang membuat pilihan untuk dicukai di bawah [ITA] tidak layak menikmati pengecualian ke atas pendapatan dividen yang diterima … Penguatkuasaan **polisi** ini bertujuan memberi layanan cukai yang lebih adil terutama bagi syarikat-syarikat [lain] yang ditaksir di bawah [ITA]. Di samping itu, ianya juga dapat menyumbang ke atas peningkatan jumlah cukai bagi pembangunan Negara. (emphasis added)
>
> (Translation: Referring to the (Exemption Order), a Labuan entity qualifies to be exempted on its dividend income … if election has been made to be taxed under the ITA. On the other hand effective 12.2.2010, the Ministry of Finance has decided that a Labuan entity that elects to be taxed under the ITA no longer enjoys exemption for income derived from dividends. The enforcement of this **policy** is to ensure fairness to other companies assessed under the ITA. Apart from that it helps to contribute towards the improved collection of taxes for the development of the country (emphasis added))

[45] Naturally the appellants were upset with the respondent's stand of blowing hot and cold, and culminating with them being at the losing end. Chronologically on 18 December 2007 the Minister of Finance *vide* the Exemption Order exempted from income tax various types of income pursuant to s. 127(3)(b) of the ITA. At the time when the appellants were respectively incorporated on 16 March 2011 (Avenues Zone) and 22 March 2011 (GA Investment and Positive Vision), no one had any inkling that the forthcoming letter dated 20 June 2012 would reveal that the exemption had ended on 12 February 2010. In other words, the termination of the exemption was backdated to even prior to the incorporation and elections of the appellants. With no information available for the consumption of the public that the exemption had ended on 12 February 2010, and the appellants still believing that the Exemption Order was still subsisting, financial common sense must have persuaded them to make the irrevocable elections.

[46] From the point of view of the appellants, the income tax law as reflected in the amended s. 3B of the ITA was settled law, in that tax shall not be charged in respect of an offshore business carried on by an offshore company that has made an election to be taxed under the ITA, if exempted. Now, with the policy issued by the Minister of Finance and the benefits illusory even before the appellants were incorporated, the benefits of the Exemption Order were already beyond the reach of the appellants. Unfortunately, they could not opt out of the ITA scheme as the election was irrevocable. By declaring 12 February 2010 as the cut-off date, the inevitable conclusion is that the said policy had led to a retrospective deprivation of a right that was statutorily available way back when exercising the rights of election.

[47] Evidentially there is nothing before us to show that prior to 2011 the Exemption Order was withdrawn, or any exemption was disallowed premised on some legal basis. As said, the first time the appellants knew of an exemption being denied to them was on 20 June 2012 through SYC1 as signed by the respondent.

[48] It was also through SYC1 that the appellants knew that once a Labuan entity has made an irrevocable election to bring itself under the ITA it loses its entitlement to the exemption on the profits. The effect of this policy naturally applies equally to the appellants.

[49] We now come to the next stage of discussing whether the Ministry of Finance could, merely by a policy or administrative decision, declare that an Exemption Order ceases to apply from a stipulated date without revoking the same.

[50] Section 3 of the Exemption Order, made on 18 December 2007, reads as follows:

A The Minister exempts from tax:

(a) dividends received by an offshore company;

(b) dividends received from an offshore company which are paid, credited or distributed out of income derived from an offshore business activity or, income exempt from tax; …

B

[51] Section 127(3) of the ITA provides that the Exemption Order is made by a statutory order, defined under s. 2 to mean an order having legislative effect. Clothed with legislative effect, this statutory order fits in squarely within the words 'subsidiary legislation', which is defined as, "any … order … or other instrument made under any Act, Enactment, Ordinance or other C lawful authority and having legislative effect, under s. 3 of the Interpretation Acts 1948 and 1967".

[52] The Exemption Order which comes as a statutory order thus has the legal status of a subsidiary legislation, and anything done under any D subsidiary legislation shall be deemed to be done under the Act or other written law under which the subsidiary legislation was made (s. 24 Interpretation Acts 1948 and 1967).

[53] On the issue of construction of an Act it is useful to make reference to the Federal Court's decision in the case of *Krishnadas Achutan Nair & Ors* E *v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 which states:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament F does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
>
> > As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. G (Per Gibbs J in *Beckwith v. R.* [1976] 12 ALR 333, at p. 337).

[54] For purposes of this appeal, in succinct terms the Minister by statutory order, as empowered by s. 127(3) of the ITA, has granted an exemption to any offshore company in respect of its dividends income. As the appellants are offshore companies, the Exemption Order therefore applies to them. H

[55] Abiding by the rules of construction of statutes, namely by first giving the words their natural and ordinary meaning, looking fairly at the language used and what is being said, and appreciating the object of the statute to ascertain the will of Parliament, be it the principal or subsidiary legislation I there is nothing difficult about the Exemption Order (*Mangin v. Inland*

Revenue Commissioners [1971] AC 739). To ascertain the intention of Parliament, speeches made in Parliament as recorded in the Hansard will be of great help.

[56] In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177, the Federal Court held that:

> Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* 28 CLR 129 at pp. 161-162:
>
> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.
>
> The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v. Singhai Kepurchand* [1976] Jab LJ 340).

[57] We are not unaware that nothing has been built into s. 3B of the ITA to nullify the Exemption Order, or for that matter, have found any evidence that justifies the rewriting of the Minister's statutory order (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265).

[58] Section 22 of the Interpretation Acts 1948 and 1967 provides that subsidiary legislation may at any time be … revoked … by the person or authority (in this case the Minister of Finance) by which it was made or by the replacement person of authority. In other words, the Minister of Finance could have, with ease, revoked the Exemption Order but this was not done. As an example, the Income Tax (Exemption) (No. 5) Order 1989 was revoked by the Income Tax (Exemption) (No. 5) (Revocation) Order 2010. In fact, when the Exemption Order was laid before the Dewan Rakyat pursuant to s. 127(4) of the ITA, the Income Tax (Exemption) Order 1991 (P.U (A) 161/199 and the Income Tax (Exemption) Order 2000 (P.U (A) 99/2000 were revoked effective from the year of assessment 2007.

[59] Under s. 127(5) of the ITA, the words legislated in no uncertain terms state that 'any income which is exempt from tax by virtue of this section shall be disregarded for the purposes of this Act.' (In the present case it would apply to the appellants' income of "dividends received by an offshore company"). Under this provision, the word "disregard" means "to ignore or omit to regard or take notice" (*Aiyars Major Law Lexicon* 4th edn. 2010 vol. 2 at p. 2075).

[60] It is pertinent to note that the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518; [2009] 4 MLJ 682 categorically stated that "In the context of s. 127(5), exemption means immunity, dispensation, exclusion, freedom, relief or exoneration from tax (see *The New Oxford Thesaurus of English 2000*)".

[61] It follows that s. 127(5) of the ITA gives the appellants vested rights that cannot be taken away unless there exist clear terms that state otherwise (*National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99 at 107; *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Co-operative Insurance Society Ltd* [2000] 2 CLJ 149; [2000] 1 MLJ 561 at 566).

[62] To wind up the issue before us, if the words of the Exemption Order are clear, then obey it (*Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421; [2014] 2 MLJ 1; *Kamla Devi v. Takhatmal* (1964) AIR SC 859). By virtue of the ordinary and natural meaning of the Exemption Order, and reading s. 3B of the ITA together with it, there can only be one interpretation ie, dividends are exempted from tax under the ITA. As giving any other interpretation will lead to a departure of what is intended by the Legislature inscribed by the words of the statutory order, it is therefore incumbent upon the respondent to put into effect the appellants' statutory right ie, to exempt dividends from income tax.

[63] Much has been submitted by the respondent that due to the amendment of s. 3B of the ITA by Act 683, an offshore company which has made an election under the LBATA must now surrender itself totally to the ITA. On a plain reading of that provision, and in isolation with the other provisions of the ITA, the respondent cannot be censured for clinging on to that view. But, once the abovementioned amended s. 3B is read together with the Exemption Order of s. 3 and s. 127 of the ITA, the argument of the respondent must fall.

[64] In art. 96 of the Federal Constitution is engraved the profound words that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of Federal law. It is also trite that Parliament may delegate some of the powers to a Minister or any administrative body; and such delegation must be confined to the express authority delegated to it.

[65] With such terse words, it is therefore the duty of the court to carefully scrutinise the extent of the delegation (in this case the respondent), particularly in cases which involve a right to impose any financial burden on a person or class of persons. Even though the appellants here have not been burdened by additional taxes, we hold the view that by depriving them of the exemption, the appellants have been financially burdened in another way. McRuer CJ in *Bulova Watch Co v. Attorney General of Canada* [1951] OR 360 had occasion to state in the following manner:

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinised than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

[66] With the impugned policy never having been issued pursuant to any power authorised by Parliament, unlike an Exemption Order which is a subsidiary legislation, the policy adverted to by the respondent therefore does not have any force of law. It must be emphasised that by no figment of the imagination is an administrative policy anywhere near the level of a piece of legislation. In accordance with the settled rules of construction, the respondent or the Ministry of Finance thus have no jurisdiction to unilaterally and arbitrarily rely on policy to deny the appellants' entitlement to the tax exemption (*Vacher & Sons v. London Society of Compositors* [1913] AC 107; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39).

[67] As the words in the Exemption Order are clear, and the appellants evidentially fall within the terms of the order, (and even admitted in SYC1 by the respondent) they therefore cannot be denied of the benefits legislated (*Edward Maughan (Surveyor of Taxes) v. The General Trustees of the Free Church of Scotland* (1893) 20R 759). In *Hansraj v. HH Dave Asst. Collector of Excise* AIR 1970 SC 755, the Supreme Court observed:

> It is well established that in a taxing statute there is no room for intendment but regard must be had to the clear meaning of the word. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority.

[68] To wind up the loose ends, in the circumstances of the case, as the above all-enveloping explanation applies to all companies in like position, regardless of their nomenclature, the ineffectiveness of the policy invariably applies with equal force to any "chargeable offshore company". In short, the need to discuss the differences between an offshore company and chargeable offshore company in this appeal is unnecessary (see para 30).

The Cut-Off Date

[69] There is no time frame mentioned in the Exemption Order as to its duration. Despite the want of time frame or cut-off date, the letter of the respondent dated 20 June 2012 which contained the impugned decision, has put the cut-off date as 12 February 2010.

[70] As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia (supra)*, it is a well-settled principle that a provision in a statute conferring power on a member of the executive to enact subsidiary legislation, particularly one that imposes a financial levy or charges upon any section of the public, must be construed strictly. Despite the legal improbability of a subsidiary legislation rising above that of its parent Act, hierarchical requirement demands that an administrative policy may not rise above a subsidiary legislation; that hierarchical requirement therefore must be safeguarded (*Kerajaan Malaysia v. Wong Pot Heng & Anor* [1997] 2 CLJ 188 at 203). Peh Swee Chin FCJ at p. 198 in the latter case had occasion to state:

> Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg, from the Administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguard for such subsidiary legislation and Courts are part of such safeguards.

[71] Perusing the Exemption Order, and as explained above, it is crystal clear that the respondent, or the Ministry of Finance, has no jurisdiction to unilaterally and arbitrarily declare 12 February 2010 as the cut-off date for the appellants to claim tax exemption for its dividend income by way of policy (*Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] 4 CLJ 576).

Conclusion

[72] With the Exemption Order yet to be revoked, apart from not prescribing a time frame for its duration, the respondent or the Ministry of Finance cannot by policy or administrative decision declare that the Exemption Order ceases to apply as against the appellants.

[73] That denial of right to the exemption is therefore *ultra vires*, illegal, void, unlawful and/or in excess of any authority given.

[74] My learned sister Zaharah Ibrahim (FCJ) has read this judgment in draft and has expressed her agreement with it.

[75] For the above reasons, we allow the appellants' appeals with costs. Costs to be subject to allocator.

[76] Question (a) is to be answered in the negative whilst questions (b) and (c) are to be answered in the positive.